

Retailers are prohibited from advertising or holding out that they will absorb the purchaser's Use Tax obligation. See 86 Ill. Adm. Code 150.515. (This is a GIL.)

February 22, 2001

Dear Xxxxx:

This letter is in response to a complaint dated February 1, 2001 that the Department received concerning your posting of a sign at an Illinois boat show that stated "No sales tax for Illinois residents on Mercury motors when purchased from the COMPANY. The nature of the complaint requires that we respond with a General Information Letter, which is designed to provide general information, is not a statement of Department policy and is not binding on the Department. See 2 Ill. Adm. Code 1200.120(b) and (c), which can be found on the Department's website at <http://www.revenue.state.il.us/legalinformation/regs/part1200>.

It is unlawful for any retailer to advertise or hold out or state to the public or to any purchaser, consumer or user, directly or indirectly, that the Use Tax or any part thereof will be assumed or absorbed by the retailer or that it will not be added to the selling price of the property sold, or if added that it or any part thereof will be refunded other than when the retailer refunds the selling price and tax because of the merchandise being returned to the retailer or other than when the retailer credits or refunds the tax to the purchaser to support a claim filed with the Department under the Retailers' Occupation Tax Act or under the Use Tax Act. Any person violating any of the provisions of the law as explained in the preceding sentence is guilty of a misdemeanor and subject to the penalties provided in the Use Tax Act. See 35 ILCS 105/7 and the enclosed copy of 86 Ill. Adm. Code 150.515.

Your activities at the Boat Show are not clear. We assume, for purposes of the following discussion, that you do not engage in selling tangible personal property in Illinois (i.e. you are not an Illinois retailer). If you are a "retailer maintaining a place of business in this State," you cannot advertise in violation of Section 7 of the Use Tax Act. Further, you are required to collect and remit Illinois Use Tax on your sales to Illinois customers. Even if you do not have nexus with Illinois and are not required to collect Use tax from your Illinois customers, your customers nonetheless incur a Use Tax liability on purchases made from you. (See discussion regarding principles of nexus below.) The bottom line is that if the property you sell is going to be used in Illinois, Illinois Use Tax is due either from you, if you are a retailer maintaining a place of business in Illinois, or from your customer who must remit the tax directly to the Department.

The following information outlines the principles of nexus. We hope it is helpful to you in determining whether you are responsible to pay tax in Illinois.

An "Illinois Retailer" is one who either accepts purchase orders in the State of Illinois or maintains an inventory in Illinois and fills Illinois orders from that inventory. The Illinois Retailer is then liable for Retailers' Occupation Tax on gross receipts from sales and must collect the corresponding Use Tax incurred by the purchasers.

Another type of retailer is the retailer maintaining a place of business in Illinois. The definition of a "retailer maintaining a place of business in Illinois" is described in 86 Ill. Adm. Code 150.201(i), enclosed. This type of retailer is required to register with the State as an Illinois Use Tax collector. See 86 Ill. Adm. Code 150.801, enclosed. The retailer must collect and remit Use Tax to the State on behalf of the retailer's Illinois customers even though the retailer does not incur any Retailers' Occupation Tax liability.

The United States Supreme Court in Quill Corp. v. North Dakota, 112 S.Ct 1904 (1992), set forth the current guidelines for determining what nexus requirements must be met before a person is properly subject to a state's tax laws. The Supreme Court has set out a 2-prong test for nexus. The first prong is whether the Due Process Cause is satisfied. Due process will be satisfied if the person or entity purposely avails itself or himself of the benefits of an economic market in a forum state. Quill at 1910.

The second prong of the Supreme Court's nexus test requires that, if due process requirements have been satisfied, the person or entity must have physical presence in the forum state to satisfy the Commerce Clause. A physical presence is not limited to an office or other physical building. Under Illinois law, it also includes the presence of any agent or representative of the seller. The representative need not be a sales representative. Any type of physical presence in the State of Illinois, including the vendor's delivery and installation of his product on a repetitive basis, will trigger Use Tax collection responsibilities. Please refer to Brown's Furniture, Inc. v. Zehnder, (1996), 171 Ill.2d 410.

The final type of retailer is the out-of-State retailer that does not have sufficient nexus with Illinois to be required to submit to Illinois tax laws. A retailer in this situation does not incur Retailers' Occupation Tax on sales into Illinois and is not required to collect Use Tax on behalf of its Illinois customers. However, the retailer's Illinois customers will still incur Use Tax on the purchase of the out-of-State goods and have a duty to self-assess their Use Tax liability and remit the amount directly to the State. The Use Tax rate is 6.25%.

The Department of Revenue maintains a website, which can be accessed at www.revenue.state.il.us. If you have further questions related to the Illinois sales tax laws, please contact the Department's Taxpayer Information Division at (217) 782-3336.

Very truly yours,

Melanie A. Jarvis
Associate Counsel

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Enc.